

ONE'S OWN SPEECH: FIRST AMENDMENT PROTECTION FOR THE USE OF PUBLIC DOMAIN WORKS IN *GOLAN V. GONZALES*

The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.¹

INTRODUCTION

John Blackburn wrote a composition based on Shostakovich’s *Fifth Symphony* for a high school band to perform at a community event.² As a creator, he relied on unfettered access to artistic works in the public domain and freely copied the expression of another to create new works.³ Mr. Blackburn, however, later learned that the underlying work for his composition, which he used because of its public domain status, was removed from the public domain by an act of Congress.⁴ Mr. Blackburn no longer had an absolute right to freely perform his arrangement of Shostakovich.⁵

Congress restored the copyright to Shostakovich’s *Fifth Symphony* and thousands of other works through section 514 of the Uruguay Rounds Agreement Act (URAA), which removed certain foreign artistic works from the public domain.⁶ Congress implemented section 514 to finally comply with Article Eighteen of the Berne Convention, which required the United States to restore copyrights to works still protected by copyright in foreign countries.⁷ These foreign works

1. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). *But see* discussion *infra* notes 203–233 and accompanying text.

2. Mr. Blackburn was a plaintiff in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007). *See infra* notes 77–120 and accompanying text.

3. *See* Appellants’ Opening Brief at 16, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05–1259) [hereinafter Appellants’ Brief] (stating that Mr. Blackburn “specifically chose the underlying Shostakovich work because he thought it was *not* encumbered by copyright”).

4. *Id.*

5. *Id.*

6. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4976 (codified at 17 U.S.C. §§ 104A, 109 (2008)); *infra* notes 53–76 and accompanying text.

7. *See* Berne Convention for the Protection of Literary and Artistic Works art. 18(1)–(2), Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. Article Eighteen provides:

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the

were in the U.S. public domain because the foreign authors failed to comply with U.S. copyright formalities, the foreign authors were ineligible for protection under past U.S. copyright laws, or the works were phonorecords not within the subject matter of past copyright laws.⁸ When section 514 took effect, restored copyright owners filed notices of intent to enforce the restored copyrights for tens of thousands of works, including J.R.R. Tolkien's *Lord of the Rings* trilogy, prints of German artist M.C. Escher, thousands of foreign films, music and artwork for classic Japanese Godzilla motion pictures, early musical recordings by Pablo Casals and Edwin Fischer, and numerous musical works by Russian composers such as Shostakovich, Prokofiev, Kabalevsky, and Stravinsky.⁹ Mr. Blackburn and other individuals using these works could no longer freely utilize artistic works that had once been in the public domain, even if they began using the works before section 514 took effect.¹⁰

On September 4, 2007, however, in *Golan v. Gonzales*, the United States Court of Appeals for the Tenth Circuit held that section 514 implicated the plaintiffs' First Amendment rights and that section 514 must be subject to First Amendment scrutiny.¹¹ Focusing on the expressive value in a person's use of public domain works, this Note argues that First Amendment review is essential to safeguard the rights of those who rely on the speech-enabling public domain. The *Golan* court correctly concluded that removal of works from the public domain interfered with the plaintiffs' ability to communicate through unrestricted use of works they had already acquired. The public domain is essential to the self-expression of performers and creators, and copyright's internal First Amendment safeguards are simply inadequate to combat section 514's impediment to the free expression of creators who use works in the public domain.

Part II explores various theories and definitions of the public domain, explains the rationale and operation of section 514 of the URAA, and provides a brief overview of *Eldred v. Ashcroft*, which

expiry of the term of protection. (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain, of the country where protection is claimed, that work shall not be protected anew.

Id. (emphasis added); see also William Gable, *Restoration of Copyrights: Dueling Trolls and Other Oddities Under Section 104A of the Copyright Act*, 29 COLUM. J.L. & ARTS 181, 185 n.21 (2005).

8. 17 U.S.C. § 104A(h)(6)(C)(i)-(iii).

9. See Gable, *supra* note 7, at 182-84; see also *infra* note 76.

10. See *infra* notes 72-76 and accompanying text.

11. *Golan v. Gonzales*, 501 F.3d 1179, 1194 (10th Cir. 2007); see *infra* notes 77-120 and accompanying text.

bears heavily on the Tenth Circuit's analysis.¹² Part III summarizes the Tenth Circuit's unanimous opinion in *Golan v. Gonzales*.¹³ Part IV examines the interests of individuals who use public domain works and argues that First Amendment review is necessary to protect a creator's expressive interest that results from acquisition and use of public domain materials.¹⁴ Part V addresses the impact of *Golan*'s traditional contours test on general challenges to copyright law and argues that First Amendment scrutiny is essential for statutes that remove works from the public domain.¹⁵

II. BACKGROUND

In *Golan v. Gonzales* the Tenth Circuit recognized a substantial First Amendment limitation on Congress's Copyright Clause power.¹⁶ The *Golan* decision, however, is significant to the subsistence of the public domain and important to individuals who rely on public domain works.¹⁷ To understand *Golan*'s particular value to the public domain, an appreciation of the hazy boundaries and varied content of the public domain is necessary.¹⁸ Section A provides a brief overview of definitions and rationales for the public domain.¹⁹ Section B next summarizes the Supreme Court's discussion in *Eldred v. Ashcroft* regarding the First Amendment as a limitation to legislation that directly impacts the public domain.²⁰ Finally, Section C explains how and why section 514 removes certain works from the public domain.²¹

12. See *infra* notes 16–76 and accompanying text.

13. See *infra* notes 77–120 and accompanying text.

14. See *infra* notes 121–251 and accompanying text.

15. See *infra* notes 252–266 and accompanying text.

16. See, e.g., Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com> (Sept. 5, 2007, 5:13 PM) (“This decision is quite important because it builds out from *Eldred*—a case that most people saw as a loss—the beginnings of a first amendment jurisprudence that would limit copyright.”).

17. See *infra* notes 240–251 and accompanying text.

18. See James Boyle, *Foreword: The Opposite of Property?*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1, 29, 31 (noting that the term “public domain” is used inconsistently and advocating for “a better analytic process of definition—not to determine whether one definition is the essential, true public domain, but the reverse—to focus on whether each is well-suited for the tasks for which it was created”).

19. See *infra* notes 22–38 and accompanying text.

20. See *infra* notes 39–52 and accompanying text.

21. See *infra* notes 53–76 and accompanying text.

A. *Defining the Public Domain*

Though there was once a dearth of public domain scholarship, scholars have recently shown a revived interest in the subject.²² No single definition or theory represents a consensus in the burgeoning field of scholarship, and often a specific threat to the public domain directs a scholar's particular theory.²³ The recent scholarship reflects a diversity of approaches and viewpoints, or even "a deep intellectual divide" among commentators.²⁴

While some scholars view the public domain as what is left over "after all methods of [copyright] protection are taken into account,"²⁵ other scholars contend that the public has an affirmative right to access and use material in the public domain.²⁶ Under the former view, a copyright statute that removes works from the public domain, or somehow alters the public domain, may raise no further question about possible interference with public rights.²⁷ By the latter view, a statute that removes works from the public domain may violate a per-

22. See, e.g., Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 786-87 (2006) (reviewing thirteen different definitions of the public domain and arguing that Duke's Conference on the Public Domain and the constitutional challenge in *Eldred v. Ashcroft* were the "main catalysts" for revived public domain interest); Boyle, *supra* note 18, at 1 (providing the Foreword for a volume with several articles dedicated to the Conference on the Public Domain held at Duke University School of Law in November 2001); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 216 (2002) ("[O]nly in recent decades has the public domain become the object of serious scholarly study."); Center for the Study of the Public Domain, Conference on the Public Domain, <http://www.law.duke.edu/pd/index.html> (last visited Nov. 1, 2008) (providing background papers, papers from the conference, and webcast video of event sessions). See also Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 308 (2004). Professor Zimmerman argues that "defenders of the public domain" realized they "needed to effectively explicate and defend the importance of a rich information commons" to counteract the growing ability and effort of intellectual property owners to increase the "scope of control they enjoy over various subsets of speech goods." *Id.* at 304, 308.

23. See Boyle, *supra* note 18, at 29 ("The most useful way to understand [the terms 'public domain' and 'commons'] and the ways they are used . . . is in relationship to the implicit fear or concern about intellectual property that each attempts to alleviate and the implicit ideal of the information ecology that each attempts to instantiate.").

24. Zimmerman, *supra* note 22, at 306.

25. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y USA 137, 138 (1993) (providing a general critique of a positive rights view of the public domain).

26. See, e.g., Ochoa, *supra* note 22, at 259; see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990) (describing the public domain as a source of raw materials for new creations).

27. See Samuels, *supra* note 25, at 176 (acknowledging that retroactive copyright restoration might raise questions of constitutionality, but also explaining that "someone who has obtained a copyright might be said to have a 'property' right or a 'vested' right that should not be impaired by later legislation, the 'rights' of the public in so-called public domain works are hardly 'vested' or 'property' rights" (emphasis omitted)).

son's right to use public domain materials, though there are many different conceptions of the nature of this public right.²⁸

The public domain may bestow a traditional property right to the public, so that "the government cannot alienate that 'property' by removing it from the public domain."²⁹ Scholars have also put forth less conventional views of the public domain that specifically relate to the freedoms of artists and creators.³⁰ For example, the public domain can be viewed as "a cultural landscape," where creators have "'baseline rights' to engage in 'unplanned, fortuitous access and opportunistic borrowing.'"³¹ Somewhat related is the idea that the public domain is "a status that arises from the exercise of the creative imagination, thus to confer entitlements, privileges and immunities in the service of that exercise."³²

Just as there are diverse views about the nature of the public right to the public domain, there are also various theories about what the public domain contains.³³ The public domain relevant to copyright law is often defined by what it does not contain: copyrighted or copyrightable material.³⁴ By this construction of copyright/no copyright, the public domain contains expressive works that are not covered by copyright for various reasons, and also includes material that could

28. See Ochoa, *supra* note 22, at 259; Meredith Shaw, Note, "Nationally Ineligible" Works: Ineligible for Copyright and the Public Domain, 44 COLUM. J. TRANSNAT'L L. 1033, 1040–41 (2006); Golan v. Gonzales, 501 F.3d 1179, 1193 (10th Cir. 2007) (advocating a positive rights perspective of the public domain: "[E]ach member of the public—anyone—has a non-exclusive right, subject to constitutionally permissible legislation, to use material in the public domain.").

29. See Ochoa, *supra* note 22, at 259; Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 118 (2003) ("[T]he public domain accords everyone equal ownership rights over material in the public domain, meaning 'public rights' of unrestricted access to and use of the material.").

30. Samuelson, *supra* note 22, at 804.

31. *Id.* at 805 (quoting Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* (Lucie Guibault & P. Bernt Hugenholtz eds., 2006)).

32. David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463, 474. Lange specifically identifies the First Amendment as a possible source of law to make his theory of the public domain a reality. *Id.* at 474 n.32; see also Samuelson, *supra* note 22, at 803.

33. See generally Samuelson, *supra* note 22, at 786.

34. See *id.* at 791 (describing this conception of the public domain, which the author identifies as the most common, as "IP-free information resources"); Litman, *supra* note 26, at 968 (defining the "public domain" as "a commons that includes those aspects of copyrighted works which copyright does not protect"). The idea of a public domain that includes all material not subject to copyright does not necessarily resolve the question about whether the public has an ownership right in the material. Litman, *supra* note 26, at 1023 (arguing that the public domain is a source for authors).

never be copyrighted, such as facts or ideas.³⁵ Generally, copyrightable works that are not covered by copyright fall into three categories: works in which the copyright term has expired, works which fail to comply with formal requirements, and government works.³⁶

Though there are competing definitions of the public domain's function and contents, there is not necessarily a correct, universal definition that is relevant to every case.³⁷ This Note specifically focuses on public domain works affected by section 514—copyrightable works that lost copyright protection because of failure to comply with formalities, lack of national eligibility, or subject matter limitations—while considering the First Amendment claims of creators and artists who interact with these works in the public domain.³⁸

B. *Constitutional Protection for the Public Domain:* Eldred v. Ashcroft

Scholars have considered the constitutional dimensions of the public domain and generally agree that the public domain is constitutionally required to some extent.³⁹ The U.S. Constitution provides Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁰ Thus, the Constitution requires that copyrighted works pass into the public domain at some point, as a perpetual grant of copyright protection would violate the Limited Times provision.⁴¹ Separately, the Supreme Court has also recognized the First Amendment value in maintaining access to the public domain of ideas or information,⁴² and

35. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1166.

36. See, e.g., Shaw, *supra* note 28, at 1046–48.

37. See Samuelson, *supra* note 22, at 833.

38. See *infra* notes 53–76 and accompanying text. The operative definition of the public domain in this Note is what Professor Samuelson describes as “information artifacts unencumbered by intellectual property rights.” Samuelson, *supra* note 22, at 789. According to this definition, the public domain includes works for which intellectual property rights have expired “or are . . . inoperative . . . and publicly disclosed works that do not qualify for [intellectual property rights] for one or more reasons.” *Id.* (alterations in original).

39. Samuelson, *supra* note 22, at 792.

40. U.S. CONST. art. I, § 8, cl. 8.

41. Samuelson, *supra* note 22, at 792.

42. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (“Yet copyright does not prevent subsequent users from copying from a prior author’s work those constituent elements that are not original—for example, quotations borrowed under the rubric of fair use from other copyrighted works, *facts, or materials in the public domain*—as long as such use does not unfairly appropriate the author’s original contributions.” (emphasis added)).

commentators have conceived of access to the public domain as a First Amendment right.⁴³

In *Eldred v. Ashcroft*, the Supreme Court considered Copyright Clause and First Amendment challenges to legislation affecting individuals who rely on public domain materials.⁴⁴ The plaintiffs were in the business of distributing products and services built on works in the public domain.⁴⁵ They challenged the Copyright Term Extension Act (CTEA), which delayed the entry of copyrighted works into the public domain by extending copyright term protections for new and existing copyrighted works by an additional twenty years.⁴⁶ The Court held that the CTEA did not violate the Copyright Clause in light of the text, history, and precedent relating to extending copyright terms.⁴⁷

The Court also considered the plaintiffs' argument that the CTEA infringed their free speech rights.⁴⁸ Reasoning that copyright's limited monopoly is compatible with free speech principles, the Court noted that "copyright's purpose is to *promote* the creation and publication of free expression."⁴⁹ The Court also relied on copyright's built-in First Amendment safeguards: the idea/expression dichotomy and the fair use defense.⁵⁰ In what are now controversial words, Justice Ginsburg explained:

43. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Zimmerman, *supra* note 22, at 374 (rejecting reliance solely on the Copyright Clause for protection of the public domain and instead finding a "second, rich source of potential protection for the public domain, derived from the First Amendment").

44. *Eldred v. Ashcroft*, 537 U.S. 186, 186 (2003).

45. *Id.*

46. *Id.* at 193.

47. *Id.* at 199–208.

48. *Id.* at 218–21.

49. *Id.* at 219.

50. *Eldred*, 537 U.S. at 219. The idea/expression dichotomy refers to copyright law's protection of an author's "original expression," but not the "ideas and information conveyed by a work." *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); see 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."). Expression, in the context of *Golan v. Gonzales*, refers to "the particular pattern of words, lines and colors, or musical notes' that composites a work." *Golan v. Gonzales*, 501 F.3d 1179, 1184 (10th Cir. 2007) (quoting ROBERT A. GORMAN, *COPYRIGHT LAW* 23 (2d ed. 2006)); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.03D (2005). The fair use defense allows the public to utilize a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. For the court in *Eldred*, "[t]he fair use defense affords considerable latitude for scholarship and comment, and even for parody." *Eldred*, 537 U.S. at 220 (internal citations omitted). But see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 562–65 (2004) (criticizing Justice Gins-

To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.⁵¹

Lower courts were left to interpret this language, and many scholars argued that Justice Ginsburg's dicta leaves the door open for First Amendment review of Congress's copyright legislation.⁵²

C. *An Unexpected Return Trip: The URAA's Removal of Public Domain Works*

Considering the various conceptions of the public domain, it is no surprise that section 514 is controversial.⁵³ Functionally, commentators have described section 514 of the URAA as a "highly technical, convoluted"⁵⁴ statute that contains "several errors and omissions that promise to aggravate and boggle the minds of many copyright owners" and "ensur[es] copyright attorneys' employment for decades to come."⁵⁵ Despite problems with the operation of the statute, the rationale for the implementation of section 514 is clear: to finally align U.S. copyright law with the Berne Convention.⁵⁶ The Berne Convention is a multilateral agreement in which countries agree to provide the same copyright protection to foreign authors as they provide to their own authors.⁵⁷ Although the United States became a member of

burg's statement as overbroad and arguing that "[m]aking other people's speeches can be an honorable endeavor," and that the "First Amendment doctrine should recognize the value of copying, which can be an important part of self-definition and of participation in culture").

51. *Eldred*, 537 U.S. at 221 (internal citations omitted).

52. See, e.g., Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1330 (2003); see also *infra* notes 80, 98–120 and accompanying text.

53. See, e.g., David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1387 (1995) (using the URAA, "a major overhaul of federal law," to support his ominous thesis "positing the end of traditional copyright jurisprudence").

54. Gable, *supra* note 7, at 187.

55. Adam P. Segal, *Zombie Copyrights: Copyright Restoration Under the New § 104A of the Copyright Act*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 71, 84 (1997).

56. See Berne Convention, *supra* note 7, art. 18. The United States first became a member of the World Trade Organization and engaged in efforts to protect intellectual property rights around the world in reaction to fears of piracy of U.S. works abroad. See Gable, *supra* note 7, at 185–86. In 1994, the United States helped organize the URAA, out of which came the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement). *Id.* at 186. The TRIPs Agreement made Article Eighteen of the Berne Convention enforceable through WTO mechanisms. *Id.*; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299.

57. See Gable, *supra* note 7, at 186 n.25 (noting that several commentators believe that Congress went beyond the mandate of the Berne Convention with the implementation of § 104A).

the Berne Convention in 1989, formal requirements of U.S. copyright law previously conflicted with the Berne Convention mandates.⁵⁸ For example, until the United States complied with the Berne Convention, copyrighted works lost protection if the copyright owner failed to affix copyright notice or if the owner failed to file a renewal application.⁵⁹ The United States' formal requirements were anomalous among Berne Convention signatories, and the amendments to the 1976 Act removed these formal requirements for all works still under copyright protection.⁶⁰ Section 514 was a retroactive remedy for those works that had already passed into the public domain for failure to comply with formalities.⁶¹

Section 514 of the URAA, codified at 17 U.S.C. § 104A, restores copyright protection to works in the U.S. public domain if the work meets several requirements.⁶² The work must have one author or rightholder who was a foreign national or domiciliary at the time of creation,⁶³ the national or domiciliary must be from a nation that adheres to the Berne Convention,⁶⁴ the work must first be published outside the United States,⁶⁵ and the work cannot be “in the public domain in its source country through expiration of a term of protection.”⁶⁶ The work must also be in the public domain in the United States for one of the following reasons:

- (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or (iii) lack of national eligibility[.]⁶⁷

A restored copyright, therefore, confers the same rights as the original copyright for the remainder of the term that would have resulted if

58. Segal, *supra* note 55, at 77–78.

59. *Id.* at 81 (describing the intricacies of the 1909 Act, covering works published prior to January 1, 1978, which required the copyright holder to file a renewal application with the copyright office to receive an additional twenty-eight years of protection). The Berne Convention specifically required that “[t]he enjoyment and exercise of these rights shall not be subject to any formality.” Berne Convention, *supra* note 7, art. 5(2).

60. See Ochoa, *supra* note 22, at 230 (noting that Congress finally passed the Berne Convention Implementation Act, which did not remove works from the public domain, but rather removed the formal requirement of notice).

61. See Gable, *supra* note 7, at 182.

62. 17 U.S.C. § 104A (2007).

63. § 104A(h)(6)(D).

64. *Id.*

65. *Id.*

66. § 104A(h)(6)(B).

67. § 104A(h)(6)(C). One commentator has argued that nationally ineligible works should not be considered “in the public domain,” and thus a person using one of these works has no affirmative use right. See Shaw, *supra* note 28, at 1056–57.

the work had not fallen into the public domain.⁶⁸ Consider Shostakovich's *Tenth Symphony*, which was published in 1954.⁶⁹ The work, governed by the 1909 Copyright Act, is eligible for a twenty-eight-year term and a forty-seven-year renewal term, which was extended by the CTEA to a sixty-seven-year renewal term.⁷⁰ Thus, because of its copyright restoration, Shostakovich's *Tenth Symphony* will not fall into the public domain until 2049.⁷¹

Any individual who began to use a restored work after January 1, 1996, is infringing the copyright of the copyright owner.⁷² If an individual used a public domain work before the date of restoration and continues to use the work, however, section 514 classifies this user as a reliance party.⁷³ A reliance party who uses reproductions or copies of a work has a twelve-month period to sell off the remaining copies, though the reliance party cannot manufacture any new copies during the twelve-month period.⁷⁴ A reliance party like Mr. Blackburn, who created a derivative work of a public domain work before January 1, 1996, may "continue to exploit that derivative work for the duration of the restored copyright" if he pays "reasonable compensation" to the owner of the restored copyright.⁷⁵ After January 1, 1996, many copyright owners fully engaged in the protection of their restored works, alerting reliance and non-reliance users of their renewed copyrights.⁷⁶ In the wake of *Eldred*, questions remained about the limits of

68. 17 U.S.C. § 104A(a)(1)(B).

69. See Copyright Catalog of Documents, <http://www.copyright.gov/records/cohd.html> (follow "Search the Catalog" hyperlink, select "registration number" in the drop down menu, search "PA0000832413") (last visited Nov. 1, 2008) (providing record of restoration copyright notice with date of publication of 1954).

70. See *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

71. (1954+28+67). See Segal, *supra* note 55, at 82 (computing copyright expiration date of an Italian film restored under the URAA).

72. 17 U.S.C. § 104A(d)(1).

73. § 104A(h)(4)(A). The statute defines a reliance party as one who with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts.

Id.

74. See Gable, *supra* note 7, at 219.

75. 17 U.S.C. § 104A(d)(3)(A)-(B); see also Gable, *supra* note 7, at 220-28 (reviewing the difficult distinction between "substantially similar reproductions" and "derivative works"). Gable explains that litigants assert that their use of an existing work qualifies as a "derivative work," so that the parties can benefit from the mandatory license available to reliance parties. Gable, *supra* note 7, at 220-28.

76. See Gable, *supra* note 7, at 182-83 (providing a detailed list that represents only the "tip of the iceberg" of the "commercially and artistically far-reaching" universe of restored works). Restored copyright owners must notify reliance parties of the restored copyright by filing a Notice of Intent to Enforce (NIE) with the Copyright Office or by serving the NIE directly on the party

judicial deference to Congress's Copyright Clause power and whether the courts would breathe life into the First Amendment in the context of removing works from the public domain.

III. SUBJECT OPINION: *GOLAN V. GONZALES*

In *Golan v. Gonzales*, the Tenth Circuit determined the constitutionality of section 514 of the URAA in light of the Supreme Court's analysis in *Eldred v. Ashcroft*.⁷⁷ Framing the controversy in the context of *Eldred*, the plaintiffs argued that section 514 was beyond the bounds of Congress's Copyright Clause power and that section 514 impinged upon the First Amendment freedom of individuals using public domain works.⁷⁸ By the time the Tenth Circuit issued its opinion, three other courts, all relying on *Eldred*, concluded that section 514 did not exceed the limitations of the Copyright Clause⁷⁹ and two district courts found that the statute was immune from First Amendment scrutiny.⁸⁰

The plaintiffs in *Golan* were orchestra conductors, educators, performers, film archivists, and motion picture distributors; each relied on the use of public domain work for his or her livelihood.⁸¹ The

using the restored copyright. *Id.* at 211. NIEs filed with the Copyright Office are published on the Federal Register. These NIEs provide constructive notice to the reliance party of the restored copyright, though restored copyright owners had to file these notices two years after the date of restoration, January 1, 1996. After the two-year period, the restored copyright owner had to serve the reliance party directly. For all non-reliance parties, a restored copyright holder could immediately enforce his or her rights against the infringer upon the effective date of restoration. *See id.* at 211–12. *See, e.g.*, Copyright Restoration of Works in Accordance with the Uruguay Round Agreements Act, 61 Fed. Reg. 46,134, 46,158 (Aug. 30, 1996), available at <http://www.copyright.gov/fedreg/1996/61fr46133.html> (providing listing of NIEs).

77. *Golan v. Gonzales*, 501 F.3d 1179, 1183 (10th Cir. 2007). Judge Henry wrote the opinion, joined by Judge Briscoe and Judge Lucero. *Id.* at 1181. As in *Eldred*, the *Golan* plaintiffs challenged the constitutionality of the CTEA in the district and appellate courts. *Id.* at 1183; *see infra* notes 82–86 and accompanying text.

78. *Golan*, 501 F.3d at 1183.

79. *See Golan v. Gonzales*, No. Civ.01-B-1854, 2005 WL 914754 (D. Colo. Apr. 20, 2005), *aff'd in part and remanded in part*, 501 F.3d 1179 (10th Cir. 2007); *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005); *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004), *aff'd sub nom. Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

80. *Golan*, 2005 WL 914754, at *1; *Luck's*, 321 F. Supp. 2d at 119.

81. *Golan*, 501 F.3d at 1181–82. The appellants described the reliance in stronger terms, claiming that “[p]laintiffs chose their vocations years ago and developed their respective businesses based in part upon the design of the United States copyright system that allowed them freely to use works in the public domain.” Appellants’ Brief, *supra* note 3, at 12–13. Lawrence Golan, for example, conducted two small symphony orchestras that performed public domain works to avoid licensing fees. *Id.* at 17. The appellants asserted that:

Golan discovered that the cost for a single performance of Shostakovich’s *Symphony No. 1* by the Lamont Orchestra went from a one-time cost of approximately \$130 to

plaintiffs challenged the constitutionality of both section 514 of the URAA and the CTEA in the United States District Court for the District of Colorado.⁸² The district court dismissed the plaintiffs' CTEA claims⁸³ and granted summary judgment for the plaintiffs' section 514 claims involving the Copyright Clause and the First Amendment.⁸⁴

A. Section 514 and Congress's Copyright Clause Power

After generally reviewing the basics of copyright law⁸⁵ and quickly concluding that *Eldred* compelled dismissal of the plaintiffs' CTEA claim,⁸⁶ the Tenth Circuit considered whether section 514 exceeds Congress's authority under the Copyright Clause.⁸⁷ The court recog-

purchase sheet music for the entire symphony and unlimited performances [when the work was in the public domain] to \$495 to merely rent the same music for a single performance [as a licensing cost for rental of music and performance].

Id. See also *supra* notes 2, 4, and 5 and accompanying text for the experience of plaintiff Blackburn.

82. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004), *aff'd*, 501 F.3d 1179 (10th Cir. 2007).

83. *Id.* at 1218–21 (concluding that the plaintiffs' challenge to the "CTEA is foreclosed by the *Eldred* decision and, as such, Plaintiffs have asserted a legal theory not cognizable as a matter of law," but refusing to dismiss the copyright and First Amendment claims for section 514 because the plaintiff had adequately distinguished the holding in *Eldred*).

84. *Golan*, 2005 WL 914754, at *1. The court found that Congress has demonstrated "little compunction" about removing works from the public domain and that Congress had a rational basis for the statute in trying to promote protection for American authors by giving foreign authors protection in the United States. *Id.* at *13–14. For the First Amendment claim, the District Court saw "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." *Id.* at *14–17. The Court cited *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), even though the Supreme Court in *Eldred v. Ashcroft* explicitly rejected the D.C. Circuit's conclusion that copyright was absolutely immune from First Amendment review. *Eldred v. Ashcroft*, 573 U.S. 186, 221 (2003).

85. *Golan v. Gonzales*, 501 F.3d 1179, 1183–84 (10th Cir. 2007). The Tenth Circuit explained that the Copyright Clause "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Id.* at 1183 (quoting *Sony Corp. of Am. v. Universal City Studio, Inc.* 464 U.S. 417, 429 (1984)). The Tenth Circuit concluded that "imaginative [public domain] works inspire new creations, which in turn inspire others, hopefully, ad infinitum." *Id.*

86. *Id.* at 1185. The plaintiffs argued that the challenge in *Eldred* only concerned Congress's extension of copyright term for works with existing copyrights, whereas the plaintiffs were now directly challenging the extension to a life-plus-seventy-years timespan for future copyrights. *Id.* Citing the Ninth Circuit's dismissal of a similar challenge in *Kahle v. Gonzales*, the Tenth Circuit agreed that "weighing the impetus provided to authors by longer terms against the benefit provided to the public by shorter terms . . . is left to Congress, subject to rationality review." *Id.* (quoting *Kahle v. Gonzales*, 487 F.3d 697, 701 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 958 (2008)). The Tenth Circuit reasoned that *Eldred's* rationale applied to a challenge to the twenty-year term extension for future copyrights and that there was "no compelling reason . . . [to] depart from a recent Supreme Court decision." *Id.* (quoting *Kahle*, 487 F.3d at 701).

87. *Id.* at 1186.

nized the plaintiffs' argument that removing works from the public domain "eviscerates" the limitations on Congress to give copyright protection only for limited times and only to promote the Arts and Sciences.⁸⁸ In the shadow of *Eldred's* teachings, however, the Tenth Circuit rejected the plaintiffs' reliance on patent law principles and refused to second-guess Congress's copyright policy.⁸⁹

The Tenth Circuit flatly rejected the plaintiffs' dependence on *Graham v. John Deere Co.* and disputed the relevance of patent law principles to copyright law.⁹⁰ The Supreme Court in *Graham* stated that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available."⁹¹ The plaintiffs cited this language to establish a baseline principle that Congress could never remove material from the public domain, but the Tenth Circuit found the rationale for this patent law rule lacking in the context of copyright law.⁹² While patents "prevent full use by others of the inventor's knowledge," a copyright does not give the holder a monopoly over knowledge.⁹³ The court concluded that while *Graham's* absolutist language was appropriate for the public domain of patents, the holding did not control in the context of copyright.⁹⁴

The court then turned to *Eldred* for guidance in briefly assessing Congress's general power to legislate under the Copyright Clause.⁹⁵ The Tenth Circuit found that the "clear import of *Eldred*" was that Congress has broad powers to legislate under the Copyright Clause,⁹⁶ and the court refused to question Congress's policy judgments.⁹⁷

B. Section 514 Requires First Amendment Scrutiny

The court did not end with its analysis of Congress's Copyright Clause authority; rather, the court reasoned that a valid exercise of

88. *Id.*

89. *Id.* at 1187.

90. *Id.* at 1186–87.

91. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). In *Graham*, the Court concluded that Congress could not authorize patents to an individual seeking to patent an invention already in the public domain. *Id.*

92. *Golan*, 501 F.3d at 1186.

93. *Id.* (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003)).

94. *Id.* at 1187.

95. *Id.*

96. *Id.* As noted *supra* in notes 56 to 61 and accompanying text, Congress implemented the URAA to comply with the Berne Convention, which secures copyright protection for American works abroad. Thus, the URAA was not "so irrational or so unrelated" to promotion of the arts and sciences as to render the statute unconstitutional. *Id.*

97. *Id.*

power under the Copyright Clause could be subject to First Amendment review.⁹⁸ On this point, the Tenth Circuit addressed *Eldred* directly and distinguished the case in two ways.⁹⁹ First, the court reasoned that section 514 alters the traditional bounds of copyright protection by deviating from the “bedrock” principle that public domain material cannot be copyrighted.¹⁰⁰ Second, the court explained how the URAA implicated plaintiffs’ First Amendment interests and found that the idea/expression dichotomy, the fair use defense, and the statutory provisions for reliance parties did not adequately protect the plaintiffs’ First Amendment interests.¹⁰¹

Relying on *Eldred*, the Tenth Circuit reasoned that copyrights are not “categorically immune from challenges under the First Amendment,” and legislation that altered the traditional contours of copyright protection could be subject to First Amendment scrutiny.¹⁰² Finding no federal authority that provided any definition for the traditional contours of copyright protection, the court explained that “the term seems to refer to something broader than copyright’s built-in free speech accommodations.”¹⁰³ Explaining that the traditional contours of copyright have a functional and historical component, the Tenth Circuit first addressed the functional aspect of the public domain.¹⁰⁴ According to the court, section 514 violated the principles that a work normally progresses from creation to copyright to the public domain, and that no individual may copyright a work in the public domain.¹⁰⁵ Additionally, the court conducted a lengthy historical analysis of Congress’s previous removal of works from the public domain.¹⁰⁶ The Tenth Circuit concluded that the history and function

98. *Golan*, 501 F.3d at 1187 (“Congress has plenary authority in all areas in which it has substantive legislative jurisdiction so long as the exercise of that authority does not offend some other constitutional restriction.” (internal citation omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976))).

99. *Id.* at 1187–88.

100. *Id.* at 1188–92.

101. *Id.* at 1192–96.

102. *Id.* at 1188 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)).

103. *Id.* at 1189.

104. *Golan*, 501 F.3d at 1189. To support a functional analysis, the court reasoned “that a contour is ‘an outline’ or ‘the general form or structure of something,’” and thus the court would “assess whether removing a work from the public domain alters the ordinary procedure of copyright protection.” *Id.* (quoting WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 284 (1984) for the definition of “contour”). To support a historical analysis, the court found that using “the word ‘traditional’ to modify ‘contours’ suggests that Congress’s historical practice with respect to copyright and the public domain must inform [their] inquiry.” *Id.*

105. *Id.* at 1189–90.

106. *Id.* at 1190–92.

of the public domain reflected a “bedrock principle . . . that works in the public domain remain in the public domain.”¹⁰⁷

The court then set out to describe how this alteration of basic copyright principles implicated the plaintiffs’ First Amendment interests.¹⁰⁸ The court started from the simple premise that every person “has a non-exclusive right, subject to constitutionally permissible legislation, to use material in the public domain.”¹⁰⁹ The First Amendment guarded this unrestrained right to artistic use, so that the “speech at issue . . . belonged to plaintiffs when it entered the public domain.”¹¹⁰ In the court’s view, the plaintiffs relied on public domain works and already created their own artistic works.¹¹¹ The court held that section 514 interfered with the plaintiffs’ vested rights of free expression and must be subject to First Amendment scrutiny.¹¹²

The court also found that the idea/expression dichotomy and fair use provisions were not designed to protect the plaintiffs’ First Amendment interests in this case.¹¹³ The Tenth Circuit reasoned that the idea/expression dichotomy was a valuable tool for the typical case when an individual tries to gain monopoly privileges over an idea.¹¹⁴ Yet, in this case, the idea/expression dichotomy was ill-suited to determine whether granting monopoly privileges over expression in the public domain violated the First Amendment.¹¹⁵ Likewise, though the fair use doctrine provides latitude for scholarship and comment, the court found that the doctrine was not a sufficient safeguard for the First Amendment interests of the plaintiffs, who once had unrestricted access to public domain works.¹¹⁶

Finally, the court drew a distinction between section 514 and the legislation at issue in *Eldred*, which provided supplemental First

107. *Id.* at 1192.

108. *Id.* at 1192–94.

109. *Id.* at 1193. In support, the Tenth Circuit quoted *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003): “once the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution.” *Golan*, 501 F.3d at 1183 (alteration in original).

110. *Golan*, 501 F.3d at 1193. The court also cited several cases in support of the proposition that “artistic expression is near the core of the First Amendment.” *Id.*

111. *Id.*

112. *Id.* at 1194.

113. *Id.*

114. *Id.*

115. *Id.* The court acknowledged the contrary view. *See id.* (“In general, the democratic dialogue—a self-governing people’s participation in the marketplace of ideas—is adequately served if the public has access to an author’s ideas, and such loss to the dialogue as results from inaccessibility to an author’s ‘expression’ is counterbalanced by the greater public interest in the copyright system.” (quoting 4 NIMMER & NIMMER, *supra* note 50, § 19E.03[A][2], at 19E-20 to -21)).

116. *Golan*, 501 F.3d at 1195.

Amendment protections for certain institutions or businesses.¹¹⁷ The Tenth Circuit was similarly dissatisfied with the URAA provisions allowing a reliance party to use a work for one year after receiving notice.¹¹⁸ As with the idea/expression and fair use provisions, the statute's safe harbor for reliance parties did not provide a "guarantee of breathing space."¹¹⁹ The Tenth Circuit remanded the case to the district court to review, under the First Amendment, whether section 514 was content-neutral or content-based, and then apply either intermediate or strict scrutiny.¹²⁰

IV. ANALYSIS

The *Golan* court properly found that copyright's built-in safeguards were not designed to combat section 514's threat to free expression, where removal of works from the public domain interfered with the plaintiffs' ability to communicate through the unrestricted use of these works.¹²¹ This Part explores how artists and creators use public domain works and argues that the restoration of copyright restricts free expression by placing limits on how creators can use works in the public domain. This Part first explores how the First Amendment protects artistic expression.¹²² This Part, in Sections B and C, further argues for a more realistic view of how creators make use of preexisting

117. *Id.* The court recounted the additional safeguards of the CTEA:

First, [the CTEA] allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. 17 U.S.C. § 108(h). Second, Title II of the CTEA, known as the Fairness in Music Licensing Act of 1998, exempts small businesses, restaurants, and like entities from having to pay performance royalties on music played from licensed radio, television, and similar facilities.

Id. at 1195–96 (alterations in original) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003)).

118. *Id.* at 1196.

119. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

120. *Id.* According to the court, content-based restrictions are those that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir. 2006)). Content-based restrictions require a court "to consider whether the government's interest in promulgating the legislation is truly 'compelling' and whether the government might achieve the same ends through means that have less of an effect on protected expression." *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Alternatively, content-neutral regulation "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Id.* (quoting *Ward v. Rock Against Racism*, 391 U.S. 781, 791 (1989)). Content-neutral restrictions must be "narrowly tailored to serve a significant governmental interest." *Id.* (quoting *Ward*, 391 U.S. at 791).

121. *See id.* at 1194–95.

122. *See infra* notes 127–133 and accompanying text. The terms "right to expression" or "free expression" here refer to the First Amendment right, which is distinct from the concept of "ex-

works and contends that the public domain serves as a source for creators and as a vehicle of self-expression for performers.¹²³ Next, this Part discusses the general limits of the idea/expression dichotomy and the fair use doctrine in addressing First Amendment interests.¹²⁴ This Part then contrasts the First Amendment arguments in *Eldred v. Ashcroft* and argues that section 514 of the URAA is an imposition on the speech of individuals who have already engaged with artistic works in the public domain.¹²⁵ Finally, this Part considers how section 514 limits the self-expression of individuals who rely on the public domain as a zone where copyright law imposes no burdens on the creative process.¹²⁶

A. *First Amendment Protection for Use of Public Domain Works*

Copyright law balances the rights of copyright owners with the public's interest in eventually receiving the work to use freely and without restrictions.¹²⁷ As a policy matter, section 514 places the interests of copyright owners above the interest of individuals to use public domain materials on their own terms.¹²⁸ Beyond policy, however, section 514 interferes with the creative process of individuals who rely on the public domain as a source of artistic material. In constitutional terms, section 514 frustrates the free expression of creators, performers, and others who rely on access to works in the public domain.

Artistic expression is at the core of First Amendment protection, and the Tenth Circuit's reiteration of this principle rests on solid precedent.¹²⁹ First Amendment protection for artistic expression persists

pressive works" or "expression," which are generally distinguished from ideas in the idea/expression dichotomy.

123. See *infra* notes 134–181 and accompanying text.

124. See *infra* notes 182–202 and accompanying text.

125. See *infra* notes 203–233 and accompanying text.

126. See *infra* notes 234–251 and accompanying text.

127. See Zimmerman, *supra* note 22, at 302–03.

128. See *Golan v. Gonzales*, No. Civ.01-B-1854, 2005 WL 914754, at *18 (D. Colo. Apr. 20, 2005), *aff'd in part and remanded in part*, 501 F.3d 1179 (10th Cir. 2007) (“It remained at all times within Congress’ authority to rectify the unfairness with which foreign authors were afflicted.”).

129. *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007). The Tenth Circuit cited several Supreme Court opinions that recognize a First Amendment protection for “music,” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); “entertainment,” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); and “pictures, films, paintings, drawings, and engravings,” *Kaplan v. California*, 413 U.S. 115, 119–20 (1973). *Golan*, 501 F.3d at 1193. *Ward* involved a constitutional challenge by sponsors of a musical event at a park to guidelines for using a band shell in the park. The particular performance at the event included rock music and speeches with an anti-racism message. *Ward*, 491 U.S. at 784–90. The Court noted that “the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city’s regulation of the musical

in court decisions despite conflicting theories of the First Amendment.¹³⁰ Moreover, courts will not consider the quality of ideas or opinions a work of art expresses, even if a particular work expresses no discernable idea or an idea that a judge might find repugnant.¹³¹ In a case involving the constitutionality of a law that banned certain forms of nude dancing, Judge Posner explained:

[E]ven if “thought,” “concept,” “idea,” and “opinion” are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions. Insofar as it is more than beautiful sound patterns, music, like striptease, organizes, conveys, and arouses emotion, though not sexual emotion primarily. If the striptease dancing . . . is not expression, Mozart’s piano concertos and Balanchine’s most famous ballets are not expression.¹³²

Judge Posner’s statements about art’s power to convey ideas are certainly debatable, but his statement reinforces the fundamental principle that the artistic expression that the First Amendment protects is not limited to art with a discernable message. By this view, the First Amendment makes no inquiry into the communicative message of artistic expression—it does not require a court to determine what a pianist really communicates when she plays a Mozart sonata, or whether John Blackburn makes a particular comment through his Shostakovich arrangement set to commemorate 9/11.¹³³

aspects of the concert,” and thus the Court reviewed the regulation under the First Amendment. *Id.* at 790. The Supreme Court recognized the communicative power of artistic expression: “[f]rom Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.” *Id.*

130. See Tushnet, *supra* note 50, at 538 (describing various views of the First Amendment). Professor Alexander Meiklejohn has rationalized the protection for art based on its value to democracy. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57; see also Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 33–39 (2002) (criticizing the self-expression and democratic governance models and advocating for a First Amendment rationale based on the “freedom of imagination”). These analyses contrast with Melville Nimmer’s more limited view of the First Amendment’s role in copyright law. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189 (1970) (arguing that a robust “democratic dialogue” is preserved as long as individuals can have free access to ideas).

131. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1090 (7th Cir. 1990) (Posner, J., concurring), *rev’d sub nom.* *Barnes v. Glenn Theater Inc.*, 501 U.S. 560 (1991).

132. *Id.* at 1093.

133. Appellants’ Brief, *supra* note 3, at 16; see Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 34 (2001).

B. The Creative Process: The Public Domain as Source

The use of preexisting expressive works is essential to self expression.¹³⁴ To understand how section 514 impinges on the First Amendment rights of individuals using preexisting material, one must first appreciate how individuals interact with public domain works and how these works are important to their speech. The inquiry here focuses on those creators who use public domain works for the purpose of making new creations and those individuals whose interest lies in performance and dissemination of works in the public domain. The communicative effect of using preexisting material is not limited by the type of material a creator uses, but the following analysis centers on the use of preexisting musical works, which relates to the facts in *Golan* that primarily involve musical composers and performers. The Tenth Circuit rightly supports a more realistic view of the author's creative process and the important First Amendment interest in a domain consisting of the "raw materials of authorship."¹³⁵

Section 514 removed works from the public domain in the fields of music, literature, and film, despite the public domain's importance to individuals who draw on existing source material to create new works.¹³⁶ Courts, at least as far back as 1845, have recognized the necessity of copying as part of the creative process.¹³⁷ The *Golan* decision promotes a more accurate view of the artistic use of public domain materials, the public domain's importance to authors who use preexisting material, and the expressive value of using this material.

A common example of the interplay between copying and creation is a musical arrangement, where a composer uses another work as a base and arranges the composition for a different medium, sometimes by changing aspects of the music itself or sometimes by arranging the written music for a different performing instrument or ensemble.¹³⁸

134. Tushnet, *supra* note 50, at 538.

135. See Litman, *supra* note 26, at 967–68.

136. See *id.* at 968 (arguing that the public domain is not a "sphere for insignificant contributions" and that its "central purpose" is to "promot[e] the enterprise of authorship").

137. Justice Story initially provided the reasoning, and the Supreme Court has recently reiterated his statements:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845) (Story, J.)); see also Litman, *supra* note 26, at 966 (noting that the necessity of using the material of others is a "truism").

138. See THE HARVARD DICTIONARY OF MUSIC 58 (Don Michael Randel ed., 4th ed. 2003) (defining "arrangement" as "[t]he adaptation of a composition for a medium different from that

Consider John Blackburn, the plaintiff in *Golan* who prepared an arrangement of Shostakovich's *Fifth Symphony* for a high school band.¹³⁹ In the process of creating his new work based on what was at one time a public domain work, Blackburn copied portions of Shostakovich's orchestral score.¹⁴⁰ In addition to the outright copying of Shostakovich's melodies, harmonies, and rhythms, Blackburn made decisions about which wind instruments should play particular parts in the orchestral score, whether certain note doublings and harmonies should be left out, and whether certain melody or accompaniment lines should be transferred up or down octaves.¹⁴¹ With these and many other decisions, Blackburn created his composition, which was made possible by his ability to copy substantially from the underlying Shostakovich symphony.¹⁴²

An arrangement is not a rare form of creation in which creators copy from an underlying work. The creative process is often a process of copying existing expression.¹⁴³ For written music, arrangement is one compositional technique of many that involves significant copying of another's work.¹⁴⁴ Musicologist J. Peter Burkholder has developed a typology of musical borrowing in written music based on his studies of composer Charles Ives, who borrowed extensively throughout his compositions.¹⁴⁵ Burkholder identifies at least fourteen different types of borrowing found in Ives's music, including categories of borrowing that, similar to a traditional arrangement, simultaneously require significant reliance on source material and the composer's unique input.¹⁴⁶

for which it was originally composed, usually with the intention of preserving the essentials of the musical substance; also the result of such a process of adaptation").

139. *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007).

140. *Id.* There are no facts in the record that Mr. Blackburn made physical copies of the score, but implicit in every arrangement is the direct copying (to varying degrees) of preexisting material.

141. The details of Mr. Blackburn's arrangement are unknown, but arrangements can vary significantly in their faithfulness to the underlying work. See Malcolm Boyd, *Arrangement*, 2 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 66 (Stanley Sadie ed., 2d ed. 2001) (noting that for arrangements "recomposition is usually involved, and the result may vary from a straightforward, almost literal, transcription to a paraphrase which is more the work of the arranger than of the original composer").

142. Appellants' Brief, *supra* note 3, at 16. Mr. Blackburn chose the Shostakovich work because he thought it was unencumbered by copyright. *Id.*

143. Cohen, *supra* note 31, at 157-60 ("[C]opying, reworking, and derivation are not peripheral or inauthentic activities, but lie at the core of creative practice however it is defined.").

144. See J. Peter Burkholder, *Borrowing*, 4 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 5 (Stanley Sadie ed., 2d ed. 2001).

145. See J. Peter Burkholder, *The Uses of Existing Music: Musical Borrowing as a Field*, 50 NOTES 851 (1994).

146. *Id.* at 854.

Consider the compositional technique that Burkholder describes as cumulative setting, where “the theme, either a borrowed tune or a melody paraphrased from one or more existing tunes, is presented complete only near the end of a movement, preceded by development of motives from the theme, fragmentary or altered presentation of the theme, and exposition of important countermelodies.”¹⁴⁷ A composer employing this technique must at some point select the underlying composition, choose fragments to incorporate, and then combine these fragments together with newly composed music. The selection and reflection of existing material, and reflection of how to incorporate it are essential steps of the creative process, throughout which the composer has an acute awareness of the preexisting work.¹⁴⁸

Composers from all periods created works by using certain common forms and techniques throughout their compositions.¹⁴⁹ The borrowing Burkholder describes is fundamentally different, as the composer creates in reference to preexisting, copyrightable material. This borrowing is more than an allusion to a specific musical era or the use of a common musical form. Moreover, the identified borrowing techniques are not unique to a single composer’s music, and diverse practices of borrowing exist for various composers, periods, and styles.¹⁵⁰ From Bach to Brahms to the Beastie Boys, the practice of borrowing, or sampling, is prevalent in various Western musical traditions.¹⁵¹ Though sampling of recorded music may be a novel issue for courts, hip hop DJs continue a long tradition of using existing music.¹⁵²

147. *Id.*

148. See Burkholder, *supra* note 144 (describing several ways in which the borrowed material affects the “shape” of the new work). For example, the preexisting work “provides the structure, virtually unaltered, but other features are changed enough to create a new entity”; the work “forms the basis of the structure or of a melodic line, with new material added or interpolated trope”; or the work can be “used as a theme, including extension and development for variations.” *Id.*

149. See *id.* at 5 (noting that “all music draws on the repertory of notes, scales, gestures and other elements available in that tradition, so that every piece borrows from earlier pieces in its own tradition” and thus the “history of borrowing in music is the history of improvisation, composition and performance”).

150. See *id.* at 8–36 (tracing practices of musical borrowing from medieval music to modern day jazz and popular music); see also Musical Borrowing: An Annotated Bibliography (J. Peter Burkholder et al. eds), <http://www.chmtl.indiana.edu/borrowing> (last visited Nov. 1, 2008) (collecting print material that discusses musical borrowing, with the ultimate goal of creating “a comprehensive, indexed, and annotated bibliography of published materials and theses relating to the use of existing music in the tradition of Western music”). The site has a feature that allows users to enter terms and search the full text of the annotations. Each annotation includes a listing of “works” and “sources” listing the referenced musical works. Musical Borrowing: An Annotated Bibliography, *supra*.

151. See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 22 (2008).

152. See *id.*

The way the composer interacts with the source material is varied and can be quite complex, and the various methods of borrowing may also have diverse and complex communicative significance.¹⁵³ A creator's use of a particular work, and the way the composer uses it, may communicate the author's reverence, disdain, or simple acknowledgment of what has come before.¹⁵⁴ That is, the selection and treatment of the source material can be a deliberate communicative act beyond the mere repetition of what the underlying work communicates.¹⁵⁵ The ways composers place borrowed material, such as juxtaposition of certain melodies or certain rhythmic figures, and the method by which composers change the underlying material, have expressive meaning to composers and audiences.¹⁵⁶

Of course, the borrowed material itself has communicative significance for anyone experiencing the work, and this significance may change with time.¹⁵⁷ Borrowing from a particular work, like the use of

153. See Tushnet, *supra* note 50, at 568 ("Copyrighted works often serve as the self-expression of someone other than the author; they can both feel like the products of the copier's own personality and be perceived by others as such.")

154. See, e.g., Charles Rosen, *Influence: Plagiarism and Inspiration, 19TH CENTURY MUSIC*, Oct. 1980, at 94 (analyzing the borrowing of several composers with a side-by-side comparison of their musical notation). Rosen describes possible meaning of the borrowing of Brahms:

Influence for Brahms was not merely a part of the compositional process, a necessary fact of creative life: he incorporated it as part of the symbolic structure of the work, its iconography. We might even conjecture that the overt references are often there as signals, to call attention to others less obvious, almost undetectable.

Id.

155. For example, Carter Pann borrowed the familiar opening motive of the second movement of Beethoven's *Ninth Symphony* in the opening of his work, *SLALOM*. See Carter Pann: *SLALOM*, http://www.carterpann.com/works_slalom-orchestra.htm (last visited Nov. 1, 2008). The source material has a particular significance to the composer, who explains that his work "is a taste of the thrill of downhill skiing" that "came directly out of a wonderful discovery I made several years ago . . . when I embarked on the mountain-base gondola with a cassette player and headphones" while listening to classical music. *Id.* Pann found that "[t]he exhilaration of barreling down the Rockies with such music pumping into my ears was overwhelming," and "[a]fter skiing with some of the greatest repertoire," he decided to "customize the experience" by writing the piece. *Id.*

156. See Burkholder, *supra* note 144, at 7. Burkholder describes how the extent of the borrowing can alter meaning:

Listeners respond differently and attribute different meanings to music that borrows the full texture of another piece, as does Stravinsky's *Pulcinella*; a melodic line, such as the Russian folk tunes in his *Petrushka*; a texture, as in the evocation of Debussy's *Nuages* at the opening of Part II of *The Rite of Spring*; or an instrumental colour, such as the English horn in the latter at the "Ritual Action of the Ancestors," again echoing *Nuages*.

Id. at 8.

157. See, e.g., *id.* at 8 ("Haydn's . . . 'Emperor' Quartet . . . would have been hard to hear during World War II without thinking of *Deutschland über alles*, the German anthem on the same melody, and the ideology of the Nazi government, lending the work potential meanings that Haydn could not have envisaged.")

particular musical styles, forms, or instrumentation, may also allow an audience to understand a new work if they are familiar with the borrowed material.¹⁵⁸ The expressive value of the underlying work may not be identical for creator and audience and the meaning can change with time, but the expressive value persists as part of the borrowing.¹⁵⁹

The public domain is a storehouse of expressive works that facilitates and encourages musical borrowing.¹⁶⁰ The recognition that creators, even masters of particular genres, are copiers emphasizes the importance of the public domain for all authors.¹⁶¹ The public domain is not a crutch for uncreative authors and composers. Viewing the creative process realistically, a reduction in access to works in the public domain limits the compositional choices of all creators.¹⁶² Though a creator could use other works in the public domain, it is no answer to say that a composer interested in Shostakovich should just borrow from Beethoven. Section 514 reduced the possibility of creators' expression by removing works from the public domain that could serve a unique role in the creative process.

C. *The Expressive Value of Performance and Distribution of Works in the Public Domain*

The public domain is more than a source for artists to create new works. Works that pass into the public domain have value as building blocks, but these works—films, books, and musicals scores—also have value separate from the creations they inspire.¹⁶³ Copyright law regu-

158. See *id.* at 7 (noting that extra-musical associations vary with the listener); see also *infra* note 159 and accompanying text. Conversely, an unexpected juxtaposition of new and familiar borrowed material can shock the listener.

159. See Norman Kay, *Shostakovich 15th Symphony*, 100 *TEMPO* 36, 37–38 (1972) (noting that Shostakovich's borrowed a famous theme from Rossini's *William Tell* overture in his *Fifteenth Symphony*). Kay, a musicologist, explains that Shostakovich borrows from *William Tell* "incongruously," and that "every other motive in the piece radiates from [the borrowing] and returns to it by way of intervallic shape." *Id.*; cf. James Wierzbicki, *Sound Familiar? Rules Are Fuzzy on Music Quotes*, ST. LOUIS POST-DISPATCH, Nov. 21, 1993, at 4C (relating the *William Tell* quotation to its use in *The Lone Ranger* radio and television show). Mr. Wierzbicki comments: "Scholars tell us that this note-for-note citation, like the symphony's allusions to works by Tchaikovsky, Mahler and Wagner, is a kind of memorial to one of Shostakovich's heroes. Was the hero Rossini, one has to ask, or was it perhaps the Lone Ranger?" *Id.*

160. See Litman, *supra* note 26, at 967.

161. See NETANEL, *supra* note 151, at 22.

162. Certainly, not every act of borrowing constitutes copyright infringement. Some copying may be *de minimis* or even unrecognizable. See *Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2004) (finding Beastie Boy's six second sampling of James Newton's written work, "Choir," was *de minimis* because the average audience would not recognize the borrowing). If borrowing is viewed as a range, however, *de minimis* use counts for only a miniscule portion of this range, and authors can borrow much more extensively from public domain works.

163. See Tushnet, *supra* note 50, at 569.

lates the activities of the music publisher and community orchestra plaintiffs in *Golan*, as the performers and distributors were using copyrighted material after section 514 restored copyrights to foreign artistic works.¹⁶⁴ By encouraging performance and distribution of public domain works, the public domain promotes speech.

An individual will often copy musical recordings, books, and films so that a secondary user can experience the expressive value of the copied material, as when a person copies a CD for later listening. Musical scores, however, serve as instructions for artistic performance, and performance is an expressive and creative endeavor.¹⁶⁵ People often buy multiple recordings of the same work and attend concerts of music that they have heard before to appreciate even subtle differences in performances.¹⁶⁶ Audience members leave a concert and debate the performers' (re)creation of the works they have just heard.¹⁶⁷ Performers emulate past performances of the same works because a particular performer's interpretation may be as important as the works performed.¹⁶⁸ In these examples, the performance, or more accurately the interpretation, can be separated from the underlying work, but copyright law regulates the performance in connection to the copyrighted work.¹⁶⁹

The public domain attracts performers.¹⁷⁰ The late Richard Kapp, a *Golan* plaintiff, was a pianist and conductor of the Philharmonia Virtuosi, a New York orchestra.¹⁷¹ Mr. Kapp programmed musical works

164. See Appellants' Brief, *supra* note 3, at 13–19.

165. See, e.g., Tushnet, *supra* note 50, at 570–71 (noting the expressive value in various performances of a play).

166. See *id.* at 569; see also, e.g., Stephen Johnson, *The Eighth Wonder*, GRAMOPHONE, July 2006, at 29, 30 (comparing 20 recordings of Shostakovich's *Eighth Symphony*). The author describes the communicative force of one recording:

Even the brooding circular movement of the passacaglia is purposeful—a quiet, patient working-through of powerful emotions in a highly contained musical form. . . . Several performances flag at the start of the finale but Järvi [the orchestra conductor] finds a rich vein of straight-faced nocturnal humour here, surfacing again in the delicious bass clarinet and violin solos near the end.

Johnson, *supra*, at 31.

167. See Tushnet, *supra* note 50, at 569 (“Each new performance produces a different effect on the audience because each represents the artist’s self-expression; the copy bears the unique marks of its copying.”).

168. See Guy Trebay, *A Judy is Born*, N.Y. TIMES, June 4, 2006, § 9, at 1 (describing how singer-songwriter Rufus Wainwright recently recreated Judy Garland’s famous 1961 Carnegie Hall performance, “the event that cemented her legend as a singer and star and elevated her to the pantheon of the unvanquished, where she steadfastly remains”).

169. See 17 U.S.C. § 106 (2000).

170. See, e.g., STEPHEN FISHMAN, THE PUBLIC DOMAIN: HOW TO FIND AND USE COPYRIGHT-FREE WRITINGS, MUSIC, ART & MORE 39 (2006).

171. See Appellants' Brief, *supra* note 3, at 14–15; see also Daniel J. Wakin, *Richard Kapp, 69, Innovative Conductor*, N.Y. TIMES, June 6, 2006, at C13 (Kapp's obituary).

in the public domain for performances and recordings for over thirty-five years because, as he explained, copyrighted works impose significant performance fees and higher sheet music rental costs than public domain works.¹⁷² The majority of works his orchestra played came from the public domain, but the restoration of these copyrights rendered the performance of some of these works cost-prohibitive and thus reduced the communicative possibilities of his orchestra.¹⁷³ Like Mr. Kapp, church musicians, community orchestras, performance ensembles in schools, instructors, or performers starting their careers can use the public domain as a vital resource.¹⁷⁴ These performances of the work also have communicative value as part of a series of performances.¹⁷⁵

The public domain also encourages investment and distribution of public domain works, as it attracts music publishers who distribute those works exclusively.¹⁷⁶ Moreover, internet archives collect public domain materials for quick and inexpensive access by the public.¹⁷⁷ The First Amendment interests of distributors are not as immediate as those of creators and performers who rely on the public domain, but distribution is particularly important to free and open discourse.¹⁷⁸ Also, selecting particular works, placing them in specific volumes, and arranging these works for performance can communicate something about the compiler's view of the underlying works chosen.¹⁷⁹ The

172. Appellants' Brief, *supra* note 3, at 14.

173. *Id.* at 14–15 (explaining that copyright restoration limits the pool of music from which the orchestra can draw, with the restoration of copyright to works by Prokofiev, Shostakovich, Vainberg, and Schnittke).

174. See Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241 (1996).

175. See PAUL GRIFFITHS, *MODERN MUSIC AND AFTER* 483 (1995) (quoting Stravinsky, who contended that “fifty recordings of the Beethoven symphony are fifty different angles of distortion: the larger the variorum, the greater the guarantee that Beethoven himself will remain intact”); see also Tushnet, *supra* note 50, at 571 (noting that the many productions of a play gain meaning in reference to each other).

176. See Appellants' Brief, *supra* note 3, at 15 (explaining that music distributor plaintiffs Luck's Music Library and Edwin F. Kalmus “have . . . had to eliminate significant portions of their holdings and are no longer able to distribute many important cultural works”).

177. See Internet Archive, About the Internet Archive, <http://www.archive.org/about/about.php> (last visited Nov. 1, 2008) (“The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library, with the purpose of offering permanent access for researchers, historians, and scholars to historical collections that exist in digital format.”).

178. See Tushnet, *supra* note 50, at 565.

179. See *id.* at 571. The organization of some volumes may not be surprising: Beethoven's Complete Sonatas, Chopin's Scherzos, or The Complete String Quartets of Shostakovich. Other volumes involve significant editorial choice: Brahms Pieces to Play Before His Major Works, The Greatest Piano Pieces of All Time, or Russian Masters at the Piano. Moreover, a publisher can communicate his views about the importance of particular works by simply choosing to publish the work. For example, if Kalmus publishes a volume of Beethoven's Piano Sonatas, but

typeface of musical volumes and the meticulous editing, or lack thereof, may also communicate something to the players who use the works.¹⁸⁰ The public domain is not a place where works go to die; investment and distribution in the public domain can be an expressive act and can further encourage expression by the performers and creators who are the beneficiaries of investment.¹⁸¹

D. *The Limits of Copyright's Built-In Safeguards*

In light of the ways artists use preexisting material for self-expression, copyright law, by allowing for a monopoly over certain forms of expression for a limited time, presents an impediment to free speech.¹⁸² Specifically, copyright owners have a limited right to prevent a creator or performer from using the copyrighted material.¹⁸³ The Tenth Circuit's First Amendment analysis for section 514 and other copyright statutes is framed by its reliance on copyright's built-in safeguards—the idea/expression dichotomy and fair use doctrine.¹⁸⁴ These two doctrines should not end the inquiry in every case, especially in the context of the public domain, as the First Amendment exists beyond the idea/expression dichotomy and the fair use doctrine.

The idea/expression dichotomy allows for only a limited class of free speech and is inadequate to address the expressive interests of the *Golan* plaintiffs.¹⁸⁵ The idea/expression dichotomy does little to protect an individual's First Amendment interest in the particular lines of

separately publishes Beethoven's Moonlight Sonata and the Pathétique Sonata, the publisher communicates to the potential buyer that these works are compositionally important, pleasing to listeners, or at least popular with players.

180. See generally Heald, *supra* note 174 (analyzing the standards of originality for publishers who register copyrights for their reproductions of public domain sheet music).

181. See Ochoa, *supra* note 22, at 256 (describing how those advocating strong intellectual property rights exaggerate in describing the public domain as a "black hole").

182. See Tushnet, *supra* note 50, at 540 (noting that a successful copyright infringement suit can prevent the defendant from "printing, performing, or otherwise disseminating certain works"). Copyright law, by giving authors "the exclusive right to their respective writings," inherently conflicts with the First Amendment's general prohibition of laws "abridging the freedom of speech." U.S. CONST. amend. I.

183. See 17 U.S.C. § 106 (2000); see also 3 NIMMER & NIMMER, *supra* note 50, § 8.15 (describing how the 1909 Copyright Act did not give copyright holders an exclusive right to nonprofit performances of their works).

184. *Golan v. Gonzales*, 501 F.3d 1178, 1194–95 (10th Cir. 2007).

185. See Netanel, *supra* note 133, at 16–17 (noting that, because of the expansive power given to a copyright holder, if a defendant's "reformulation, adaptation, or other such derivative work is deemed to appropriate the copyright holder's 'expression,' not just 'idea,' the defendant may be held liable," even if the defendant adds "considerable creative input" and his or her work "can be said to resemble the original only at a fairly high level of abstraction").

a poem or the melodic lines of a sonata.¹⁸⁶ For example, an individual may be able to explain the meaning or idea of a Shostakovich symphony, but her description may not accurately or coherently convey a specific meaning without use of the underlying expression.¹⁸⁷ Moreover, the First Amendment protects a speaker's particular expression of an idea, and courts do not ask whether the speaker could express himself in another way because there is First Amendment value in expression.¹⁸⁸ As Professor Tushnet explains, copying expression is prohibited "not because expression is unimportant to the free flow of ideas, as the idea/expression dichotomy suggests, but because it is so important that it must be encouraged by state-backed legal protections."¹⁸⁹ Protection for the public domain is vitally important because those who use public domain works can freely express themselves by using the expression—not just the ideas—from works in the public domain.

The fair use doctrine functions as a First Amendment safeguard by allowing an individual to use copyrighted material in ways that would otherwise infringe copyright.¹⁹⁰ Specifically, the fair use doctrine provides additional protection beyond the idea/expression dichotomy for those who use the expressive components of works.¹⁹¹ Besides being "even more notoriously opaque than the idea/expression distinction,"¹⁹² the statutory fair use test often values certain types of copy-

186. See *id.* at 15–17 (providing several examples from case law where the speaker's use of an underlying text was not "absolutely necessary," but would be less effective or believable without the underlying material).

187. *Id.* at 14. The classic case is *Time, Inc. v. Bernard Geis Associates*, which involved an amateur film of the Kennedy assassination. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968). In a book criticizing a government report about the shooting, a university professor included a few frames from the film. *Id.* at 132. Time had obtained the rights to the film and sued for copyright infringement. *Id.* at 131. Though the university professor could have relied on his own description of the film, he would have been unable to capture the raw power of the famous event as authentically or clearly as the film footage itself. Netanel, *supra* note 133, at 14.

188. See Rubinfeld, *supra* note 130, at 14–16.

189. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 11 (2000).

190. See 17 U.S.C. § 107 (2000).

191. See, e.g., *Golan v. Gonzales*, 501 F.3d 1179, 1195 (10th Cir. 2007). The Tenth Circuit relied on the preamble of the statute, which provides, at the least, a starting point. The statute specifically describes the fair use defense as important to "reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107.

192. Rubinfeld, *supra* note 130, at 16. Both the idea/expression dichotomy and the fair use doctrine "have the virtue of flexibility," but the required case-by-case application also leaves creators and speakers unable to predict whether a particular use is an infringing use. Tushnet, *supra* note 50, at 554.

ing such as parody, criticism, or transformative uses.¹⁹³ Yet, the simple copying of a work—pure copying that includes the use of expressive content—can be core First Amendment speech.¹⁹⁴ Though the fair use doctrine may be necessary to protect First Amendment concerns, fair use is not sufficient to preserve the First Amendment whenever Congress enacts a copyright statute.¹⁹⁵

The Supreme Court has recognized one work's parody of a copyrighted work can be fair use,¹⁹⁶ and courts applying the fair use analysis have consistently focused on whether a secondary use is transformative of the preexisting material.¹⁹⁷ Importantly, the focus on transformation is an acknowledgement that there is expressive value in using a preexisting work.¹⁹⁸ If the focus on transformation becomes a focus on the criticism or parody of the underlying work, as some scholars have warned, then the First Amendment protection of the public domain is all the more important.¹⁹⁹

193. See Tushnet, *supra* note 50, at 558 (arguing that because “transformative uses fit comfortably in an older, constitutionalized discourse about criticism, contrarianism, protest, offensiveness, and unpopularity . . . it lacks any ability to defend pure copying on First Amendment grounds and thus cedes a large segment of formerly fair uses to copyright owners”).

194. *Id.* at 562.

195. See *id.* at 568–74 (describing several situations where the use of another's expression serves the creative interests of the secondary speaker); see also Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 408–10 (2005) (arguing that fair use is not a necessary or inevitable feature of copyright law in the abstract, but may nonetheless be constitutionally required given the current breadth of copyright protection).

196. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Supreme Court found that the rap group 2 Live Crew's song, “Pretty Woman,” which parodied Orbison's “Oh, Pretty Woman” was fair use because, *inter alia*, the work was transformative. The Court stated that it “might not assign a high rank to the parodic element” of 2 Live Crew's song, but that the song “reasonably could be perceived as commenting on the original or criticizing it.” *Id.* at 583.

197. See *id.*; Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test . . . [I]f the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

198. See, e.g., *Campbell*, 510 U.S. at 581–83 (discussing how the parodying work commented on the preexisting work).

199. See *supra* note 193 and accompanying text. Justice Kennedy, in his *Campbell* concurrence, indicated his unease with an expansive view of transformative use:

We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a “comment on the novice of the original” If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.

Campbell, 510 U.S. at 599 (Kennedy, J., concurring) (internal citations omitted).

Even if courts construe transformative use more broadly, however, restoring copyright to a work that a creator uses significantly narrows the range of expression for those creators whose work is not deemed transformative. Though a particular author's use of material may not be transformative, there is still expressive value in his use of preexisting artistic material.²⁰⁰ The fair use test is not a measuring stick for the communicative value of using preexisting material. Even if a work is sufficiently transformative, the statutory fair use test is guided by other considerations besides transformation, so that a use may not be fair even if it is transformative.²⁰¹ Finally, separating weak transformation from other transformation may be appropriate for a fair use inquiry, but the amount of transformation should not serve as the sole indicator of the First Amendment value of a work that uses preexisting material.²⁰²

E. Distinguishing Eldred: The Expressive Value of Interacting with Public Domain Works

Despite the force of arguments that copyright's internal safety valves are inadequate to address First Amendment concerns, the Supreme Court limited the First Amendment to the idea/expression dichotomy and the fair use doctrine in *Eldred v. Ashcroft*, finding that copyright's internal safeguards generally protected First Amendment concerns.²⁰³ Those individuals who have an interest in using works with restored copyrights could rely on the idea/expression dichotomy and fair use doctrine to vindicate their First Amendment rights, just as Eric Eldred could for the extra twenty years he would have to wait for a copyright to expire.²⁰⁴ In *Golan*, the Tenth Circuit sought to distinguish *Eldred* with respect to the First Amendment analysis by focusing on the plaintiffs' unique interests in using expressive works available in the public domain.²⁰⁵ Specifically, the Tenth Circuit focused on the

200. See Tushnet, *supra* note 50, at 559–60.

201. See Sag, *supra* note 195, at 424 (identifying other “guiding principles” beyond transformation that are part of the fair use inquiry).

202. A non-transformative, but highly expressive, use may be at the core of the First Amendment, just as a non-transformative use—such as making copies for classroom use—may be at the core of the fair use doctrine. See Tushnet, *supra* note 50, at 556, 567.

203. See *supra* notes 44–52 and accompanying text.

204. *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

205. *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007). The Tenth Circuit hints that the plaintiffs' interests in public domain materials are vested rights, as the Tenth Circuit explains that “the speech at issue here belonged to plaintiffs when it entered the public domain,” and that the plaintiffs' performances and artistic productions were planned “in reliance on their rights to these works.” *Id.*

process of interacting with expressive works in the public domain and acquiring these works as one's own speech.²⁰⁶

1. *Communicating Through "Other People's Speeches"*

All creators build on preexisting speech, and the public domain represents a domain of free material.²⁰⁷ The creative process—copying, reworking, and reinterpreting existing expression—is uninhibited in the public domain.²⁰⁸ Like libel and obscenity laws, copyright laws are an exception to the First Amendment: they limit speech but are nonetheless constitutional.²⁰⁹ Even if the idea/expression dichotomy and the fair use doctrine generally protect First Amendment interests, these safeguards are not the lone protectors of free speech interests. The public domain of expressive works is built into the system of copyright law and individuals can use public domain works to express themselves without the normal constraints of copyright.

Individuals who rely on public domain works use those works without having to obtain permission from a copyright owner, without considering the extent of their borrowing, and without running the risk of an infringement suit.²¹⁰ When a composer creates a new work in reference to an existing work, the selection of the new work may be based in part on the work's public domain status.²¹¹ Similarly, performers may consider the status of the musical works which they perform and what royalties are associated with their performances or recordings.²¹² The use of a public domain work is as close as a person may get to a guarantee of absolutely uncontested use, and technology

206. *Id.* at 1193–94. The focus on the Tenth Circuit's reasoning is not meant to take away from the force of the arguments that an act of copying (even for copyrighted material) is speech. Rather, this Section discusses the interests of creators in the public domain, while acknowledging the limits of *Eldred*, which the Tenth Circuit had to distinguish in order to ever reach the First Amendment review claim. See Tushnet, *supra* note 50, at 547 (arguing that courts should recognize the First Amendment value in pure copying).

207. Litman, *supra* note 26, at 967.

208. See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003) (“[O]nce the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution.”).

209. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and Bartnicki, 40 *HOUS. L. REV.* 697, 713 (2003).

210. See FISHMAN, *supra* note 170, at 2–3.

211. Though the status of a particular work is not always easily ascertained, the Internet provides a wealth of information (some specific to a particular field). See, e.g., *Copyright Term and the Public Domain in the United States*, http://www.copyright.cornell.edu/public_domain/ (last visited Nov. 1, 2008) (providing a detailed list of public domain works arranged by type and country of publication).

212. See FISHMAN, *supra* note 170, at 94.

allows for quick and inexpensive identification and access to public domain sources.²¹³

The plaintiffs in *Eldred* argued that the CTEA, by turning off the flow of works into the public domain, interfered with their First Amendment rights.²¹⁴ Section 514 of the URAA, in contrast, removed works from the public domain that already served as the raw materials of authorship.²¹⁵ Authors already put these works to use. The *Golan* plaintiffs were not asserting a right to use other people's speech; rather, the plaintiffs argued that section 514 interfered with their speech.²¹⁶ The *Golan* plaintiffs' expression may have encompassed Shostakovich's symphonies and Prokofiev's *Peter and the Wolf*, but the expression of these works in a new composition or as part of a performance was wholly the speech of the plaintiffs.²¹⁷

An individual speaks her own speech when she copies preexisting material, and her expressive interest develops through the various ways she uses material.²¹⁸ A composition can be dissected to reveal the borrowed portions and the performer's interpretation can be separated from the underlying source, but this separation tells little about the expressive value of the composition or performance.²¹⁹ The expressive force of the work is the product of the interaction between preexisting and new material, and sometimes the combination of the new and old is the most effective way to communicate.²²⁰

In the "Yes We Can" presidential campaign video for Senator Barack Obama, for example, celebrities and musicians mix their own voices and original music with a stump speech in which Obama repeatedly announces, "Yes We Can!"²²¹ The creator of the video,

213. See, e.g., The Mutopia Project: Free Sheet Music For Everyone, <http://www.ibiblio.org/mutopia> (last visited Nov. 1, 2008) (compiling over 1000 musical compositions in PDF form, available for download).

214. See *supra* notes 44–52 and accompanying text.

215. *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007).

216. See *id.* (explaining that the speech "belonged to the plaintiffs" when it entered the public domain).

217. See Appellants' Brief, *supra* note 3, at 17 (describing how the Lamont Symphony Orchestra and the Portland Ballet owned and would borrow sheet music for public domain works, but now cannot perform the works because the groups are required to obtain a license for dramatic performances).

218. See Tushnet, *supra* note 50, at 562 (discussing the expressive value of pure copying beyond the expressive value of using preexisting work in new works and performances).

219. See *id.*

220. See, e.g., *id.* at 573 (describing how Chief Justice Rehnquist dissented in *Texas v. Johnson* and "could think of no more eloquent way to argue for the value of the American flag than by quoting John Greenleaf Whittier's poem *Barbara Frietchie*, among other sources whose reproduction added power to his argument").

221. Barack Obama: Change We Can Believe In, <http://my.barackobama.com/page/invite/yescanvideo> (last visited Nov. 1, 2008).

will.i.am of the Black Eyed Peas, indicated that he “came up with the idea to turn [Obama’s] speech into a song . . . because that speech [a]ffected and touched [his] inner core like nothing in a very long time.”²²² Though viewers’ responses to the video are likely very different depending on their view of the candidate, viewers react to a message that is the result of the interaction between new music, celebrity voices and images, and the images and sounds of Barack Obama’s oration.²²³ Though Obama’s preexisting speech can be separated from the new music, images, and sounds of the “Yes We Can” video, the communicative significance—the First Amendment value—of the video cannot rightly be categorized as the video creator’s “own speech” and “other people’s speeches.”²²⁴ Similarly, though the *Golan* plaintiffs’ additions and interpretations can be separated from the preexisting works they used, section 514 limits their free expression by imposing limits on use of preexisting works they have used as part of their own speech.

2. *The Built-In Speech Benefits of the Public Domain*

Eldred suggests that speech through copying of works protected by copyright offends the rights of the copyright owner and weakens the First Amendment interest asserted by creators.²²⁵ When works have entered the public domain and creators interact with these works, however, the rationale breaks down. The public domain does not operate as a domain of other people’s speeches; the public domain represents absence of ownership.²²⁶

The *Golan* plaintiffs freely acquired works, but now they cannot communicate using these works because the works’ copyrights have been restored. For example, plaintiff S.A. Publishing Co. had a complete collection of Shostakovich’s *String Quartets* on recording,²²⁷ Section 514 restored the copyright for nine of these quartets, and the Harry Fox Agency’s demand for mechanical royalties of between \$1.25 and \$1.50 per CD made the distribution of the CD recordings

222. Dipdive, Dipfinition: The Yes We Can Song, www.dipdive.com (last visited Nov. 1, 2008).

223. *See id.* The Obama video is not an example of a person’s use of material in the public domain. The example, however, illustrates that preexisting speech is vitally important to the communicative act, and that the communicative message is impaired when use of the underlying preexisting material is not possible.

224. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

225. *Id.*

226. *See supra* notes 22–32 and accompanying text.

227. Appellants’ Brief, *supra* note 3, at 18.

economically unfeasible.²²⁸ Similarly, plaintiffs Ron Hall and John McDonough own a film distribution business specializing in public domain films.²²⁹ McDonough identified over fifty films that the business owned outright that could no longer be distributed for sale and rental to colleges, universities, and the general public.²³⁰

These plaintiffs acquired and used unowned works in the public domain, but section 514 impeded their existing expressive interests that developed when they invested in the works and distributed them. Specifically, the First Amendment interests of these plaintiffs developed upon their use of unowned works, and section 514 interfered with these First Amendment interests by restoring copyright ownership and preventing further expression through the use of the restored works.

The *Golan* plaintiffs could certainly rely on the idea/expression dichotomy and the fair use doctrine once the copyrights were restored in the works they were using. Moreover, section 514 includes provisions that lessened the burdens on speech.²³¹ But as the examples above illustrate, these provisions do not adequately serve the First Amendment interests of the *Golan* plaintiffs. When copyrights are restored for public domain works, the more specific, limited idea/expression dichotomy and fair use doctrine cannot substitute for the unlimited speech that the public domain provides. The Supreme Court thus far has accepted or ignored the inadequacies of copyright's built-in safeguards in protecting speech,²³² but courts should not accept these inadequacies for those who use public domain works. The speech-enabling public domain acts together with copyright's internal safeguards, but the public domain, by allowing for burden-free speech, is a separate, essential feature of the balance between copyright laws and the First Amendment. The Tenth Circuit correctly recognized this when it reasoned that copyright's built-in safeguards were not *designed* to address the First Amendment interests of the *Golan* plaintiffs.²³³ Section 514 upsets the balance between copyright and the First Amendment for the *Golan* plaintiffs, and copyright's internal safeguards cannot restore stability.

228. *Id.*

229. *Id.* at 15.

230. *Id.* at 15, 19.

231. See *supra* notes 73–76 and accompanying text.

232. See Volokh, *supra* note 209, at 713–14 (explaining how copyright law can be viewed as an exception to the First Amendment, justified by the Copyright Clause's command to provide copyright protection as an incentive for authors to create new works).

233. *Golan v. Gonzales*, 501 F.3d 1179, 1194 (10th Cir. 2007).

F. Reliance on a Stable Public Domain

Those who acquire public domain works are not similarly situated to those who acquire copyrighted works: those who use works in the public domain are aware of the speech benefits of the public domain, which shapes their expectations as to the acceptable uses of preexisting works. That is, the public domain of expressive works is truly “a place like home, where, when you go there, they have to take you in and let you dance.”²³⁴ The Tenth Circuit’s recognition of the First Amendment value of the public domain is vitally important for creators who rely on the public domain.

Creators and performers cannot avoid considerations of copyright law, and they interact very differently with works in the public domain than with works still under copyright protection. The use of copyrighted works involves considerations of copyright at all stages of creation. Creators are not unaware of what uses are permitted when using works under copyright, as industry-specific standards provide guidance for fair use in light of the uncertainty that arises in a case-by-case application of the doctrine.²³⁵ Similarly, musical performers or their representatives likely know the scope of public performance rights.²³⁶ In contrast, use of a public domain work involves, at most, a single determination about a work’s status.

Those individuals who use copyrighted works may be protected by the fair use doctrine or the idea/expression dichotomy, or their use might be so slight that it does not infringe the copyrights of preexisting works.²³⁷ Of course, those who build on preexisting works would likely prefer to use public domain works that are free for all. *Golan* is important to the persistence of the public domain, however, not because the public domain is a magical place that benefits creators and performers, but because the public domain serves an important source function that enables and encourages free expression.²³⁸ Interference with the public domain—without a realistic assessment of the speech

234. See, e.g., Lange, *supra* note 32, at 470.

235. See, e.g., ASS’N OF INDEPENDENT FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE, available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf (last visited Nov. 1, 2008) [hereinafter FILMMAKERS’ STATEMENT]; Electronic Frontier Foundation: Legal Guide for Bloggers, <http://w2.eff.org/bloggers/lg> (last visited Nov. 1, 2008); Daniel J. Cohen & Roy Rosenzweig, *Digital History: A Guide to Gathering, Presenting, and Preserving the Past on the Web*, <http://chnm.gmu.edu/digitalhistory/copyright/5.php> (last visited Nov. 1, 2008).

236. See, e.g., Q & A About the ASCAP License Agreement for Symphony Orchestras, <http://www.ascap.com/licensing/pdfs/symphonic/faq.pdf> (last visited Nov. 1, 2008).

237. See Tushnet, *supra* note 50, at 582–84.

238. See *supra* notes 160–162 and accompanying text.

that the public domain facilitates—ignores the realities that creators confront today.²³⁹

First Amendment protection of a robust public domain will not always alleviate the tension that creators feel when they use the works of others. A particular author may want to use material from a work that is still under copyright protection, and she will have to grapple with whether her copying constitutes copyright infringement.²⁴⁰ Moreover, an author's choice of which material to copy, sample, and borrow may not initially rest on whether the material is in the public domain. For example, a composer who wants to quote, rework, and improve upon a passage of his contemporary will borrow material even though it is protected by copyright.²⁴¹

Still, the *Golan* decision is extremely important to those individuals who use public domain material. Copyright's internal First Amendment safeguards, while providing protection for free speech, also impact the creative choices of those who use copyrighted works.²⁴² Moreover, these safeguards and the test for infringement generally are unpredictable, especially for close cases.²⁴³ The *Statement of Best Practices for Documentary Filmmakers*, a particularly well-crafted example of a practical guide for fair use that seeks to avoid some indeterminacy, provides guiding principles that limit the ways in which filmmakers use copyrighted material in documentaries.²⁴⁴ These principles are helpful, but they may also direct the creative process away from the artist's vision, and as a result the creative process will be based on legal formalities. At best, creators can avoid altering their artistic vision or changing their vision only slightly while staying cognizant of the guidelines.²⁴⁵ At worst, creators may drastically alter their

239. See *supra* notes 134–162 and accompanying text.

240. See Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397, 404 (2006) (arguing that fair use “tends to promote careful, minimalist speech rather than robust free speech”).

241. See, e.g., Burkholder, *supra* note 144, at 26–27 (describing Mozart's borrowing from his contemporaries).

242. The argument here does not refer to the limits of the fair use doctrine and the idea/expression dichotomy; rather, the argument is that these doctrines are no match for the possible range of practices that the public domain allows.

243. See NETANEL, *supra* note 151, at 61–62, 66.

244. FILMMAKERS' STATEMENT, *supra* note 235, at 6–8.

245. See *id.* at 6 (“[T]wo goals of the preceding statement are to encourage documentarians to rely on fair use where it is appropriate and to help persuade the people who insure, distribute, and program their work to accept and support documentarians in these choices.”).

message or avoid speaking at all, chilled by the threat of possible costly copyright litigation.²⁴⁶

Creators can avoid the limits of expression that the idea/expression dichotomy and fair use impose, and the indeterminacy and risk of using copyrighted works, by turning to the public domain. Fair use and the idea/expression dichotomy certainly provide some breathing space for free speech, but the public domain provides more. The public domain essentially functions to bring recommended practices in line with actual, uninhibited creative practices.²⁴⁷ In the public domain, free creativity allows for free expression—without filtration of content or message.

The public domain attracts creators because of the advantages it offers to free expression.²⁴⁸ Copyright law's limitations may shape creative decisions, but the absence of limitations allows for a different level of interaction. The best practices statement reminds filmmakers that fair use does not have to be boring—perhaps a reaction to the uneasiness creators may feel when they use copyrighted material.²⁴⁹ The public domain is a resource that allows for unconstrained free expression, and section 514 disrupts individuals' reliance on the public domain by placing limitations on their expression after they have engaged public domain works.²⁵⁰ Whether these limits to expression come in the form of the statutory factors of the fair use analysis, uncertainty about whether the borrowed material is idea or expression, or even industry-specific recommended practices, section 514 imposes limits upon individuals who relied on use that was absolutely uninhibited by copyright.²⁵¹ The public domain allows for expression without guidelines, and restoring copyright for works in the public domain reinstates these guidelines and limits the speech of those who rely on the public domain.

246. See, e.g., Lawrence Lessig, *Re-Crafting a Public Domain*, 18 *YALE J.L. & HUMAN.* 56, 59–60 (2006) (arguing that lawyers and judges are “blind” to the limits of fair use and the idea/expression dichotomy and in practice fair use really becomes “the right to hire a lawyer”).

247. Compare FILMMAKERS' STATEMENT, *supra* note 235, at 6–8 (guidelines for use of copyrighted material), with Peter Jaszi, “Yes You Can!”—Where you don't even need ‘fair use,’ http://www.centerforsocialmedia.org/files/pdf/free_use.pdf (last visited Nov. 1, 2008) (noting, without need for extensive rules, that public domain works “are free for use”).

248. See FISHMAN, *supra* note 170, at 3.

249. See FILMMAKERS' STATEMENT, *supra* note 235, at 6.

250. See *Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007).

251. See *supra* notes 208–213 and accompanying text.

V. IMPACT

The analysis above focuses on the expressive value of using preexisting public domain works and advocates First Amendment review for a statute that removes works from the public domain. The *Golan* decision has greater implications for the application of First Amendment scrutiny to a range of copyright legislation.²⁵² According to the *Golan* court, copyright statutes are suspect if they alter the traditional contours of copyright.²⁵³ Commentators have questioned whether this language from *Eldred* can be used as a coherent test, and they have also questioned whether the Supreme Court intended to create a standard to determine when courts should apply First Amendment scrutiny to copyright statutes.²⁵⁴

Questions about the applicability of the traditional contours test raise further questions about the application of First Amendment review of section 514. Do the feasibility problems of the traditional contours test mean that there should be no First Amendment inquiry into the removal of works from the public domain? The traditional contours inquiry in *Golan* is a historical and structural analysis of past treatment of works entering the public domain.²⁵⁵ In other words, the test asks: Is this legislation peculiar to the history or function of copyright law? This inquiry just opens the door to the First Amendment analysis, which then asks: How does this statute affect speech, and do the idea/expression dichotomy and the fair use doctrine adequately address the plaintiff's speech interests?

This Note focuses on the latter question and concludes that the removal of works from the public domain interferes with the free expression of those who rely on the public domain. While the historical inquiry into past practices may be informative, the actual analysis of the First Amendment implications of section 514 should not depend solely on the traditional contours analysis. Litigants can show an imposition on free expression that the idea/expression dichotomy and the fair use doctrine do not alleviate, and the courts can respond by applying a First Amendment analysis.²⁵⁶ In *Golan*, the Tenth Circuit correctly recognized that copyright's internal safeguards did not ade-

252. See *supra* note 16 and accompanying text.

253. *Golan*, 501 F.3d at 1187–88 (reasoning that any act of Congress that alters the traditional bounds of copyright could be subject to First Amendment scrutiny).

254. See, e.g., Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1189051800.shtml> (Sept. 6, 2007, 12:10 AM).

255. *Golan*, 501 F.3d at 1188–89.

256. Recent Case, *Tenth Circuit Subjects Copyright Statute to First Amendment Scrutiny: Golan v. Gonzales*, 121 HARV. L. REV. 1945, 1951 (2008) (arguing that First Amendment review is appropriate “whenever new legislation affects speech interests in a manner that copyright’s in-

quately protect against the URAA's threat to the expression of performers, creators, and publishers who could no longer use public domain works without restrictions. First Amendment scrutiny is essential not just because removing works from the public domain defies tradition and history, but because the public domain is a valuable, essential zone of free speech that supplements copyright's First Amendment safeguards.

The Tenth Circuit remanded to the district court to determine whether section 514 violates the First Amendment.²⁵⁷ The court noted that because of the strong interest of the United States in adhering to the Berne Convention, the treaty obligations of the United States may serve as a compelling or significant government interest.²⁵⁸ Even if the district court finds the treaty interest significant, the court will still have to decide if there are less restrictive means to carry out the government's purpose or if the statute is narrowly tailored to that interest.²⁵⁹ The court noted that other countries have more inclusive definitions of a reliance party, and that these reliance parties can be bought out by the owner of the restored copyright.²⁶⁰ Thus, even though the Berne Convention may provide a compelling reason for implementing section 514, the district court should inquire why the United States did not follow the less speech-restrictive course of other Berne signatories.

The *Golan* decision is also significant to courts that must analyze any legislation that removes works from the public domain.²⁶¹ The treaty rationale may serve as a compelling interest for restoring foreign copyrights, but the rationale does not justify restoring domestic copyrights.²⁶² Though the URAA extends only to foreign copyrights,

ternal safeguards cannot cure, even if Congress has not directly altered the idea/expression dichotomy or the fair use defense").

257. *Golan*, 501 F.3d at 1196.

258. *Id.* at 1196 n.5.

259. *Id.* at 1196.

260. *Id.* at 1196 n.5. The United Kingdom, Australia, Canada, India, and New Zealand define a reliance party as any person who "incurs or has incurred any expenditure or liability in connection with, for the purpose of or with a view to the doing of an act which at the time is not or was not an act restricted by any copyright in the work." *Id.* Under the "British, Canadian, Australian, and Indian systems, 'the reliance party is allowed to continue making those uses of the work it had made, or incurred commitments to make, before its copyright is restored. . . . [T]he reliance party must cease exploiting the work if the owner pays compensation, in an amount to be determined by negotiation or arbitration.'" *Id.*; *cf. supra* notes 72–76 and accompanying text (providing text of U.S. reliance provision).

261. See David Nimmer on the Potential Invalidation of Portions of the Copyright Act Based on A Conflict with the First Amendment in *Golan v. Gonzales*, LEXISNEXIS EXPERT COMMENTARIES, Nov. 2007, at 6 [hereinafter NIMMER COMMENTARY].

262. *Id.*

copyright scholar David Nimmer warns that “the unsettling prospect of complete and total resurrection of the dead is now no longer merely the stuff of copyright science fiction.”²⁶³ Copyright owners in the United States whose works have fallen into the public domain because of failure to comply with formalities may demand that copyright be restored for their works, as well.²⁶⁴ In 1997, Congress extended restoration to some U.S. works in a technical amendment that effectively restored copyright to works distributed in phonorecords before 1978.²⁶⁵ Therefore, even if section 514 survives First Amendment scrutiny, the *Golan* decision provides an important impediment to comprehensive copyright restoration.²⁶⁶ The decision allows courts to apply First Amendment scrutiny to other copyright restoration statutes and thus preserves the public domain.

VI. CONCLUSION

We all enjoy the public domain, even if we do not appreciate each occurrence of our use. We can freely copy from court cases, statutes, and other government documents. We enjoy countless derivative works based on works in the public domain in concert halls, in movie theatres, and on our iPods. We can use the Internet to instantly access the entire works of Shakespeare or the sheet music for Mozart’s piano sonatas. Beyond these uses, the public domain is an important source of creative material that encourages free expression. In *Golan v. Gonzales*, the Tenth Circuit rightly held that the district court should apply First Amendment scrutiny to a statute that restored copyright to public domain works, where the plaintiffs had a vested expressive interest in distributing, performing, and adapting these artistic works. The public domain encourages truly free speech and allows creators and others to cast off the considerations that accompany the use of works under copyright protection. For those who rely on public domain works, restoration of copyright to works in the public domain reinstates the burdens of using copyrighted works. These burdens in turn limit the free expression of creators, who must then temper their artistic vision. First Amendment scrutiny is necessary to fully analyze

263. 3 NIMMER & NIMMER, *supra* note 50, § 9A.01.

264. NIMMER COMMENTARY, *supra* note 261, at 6.

265. See 17 U.S.C. § 303(b) (1997); see also 3 NIMMER & NIMMER, *supra* note 50, § 9A.01 (noting that the rationale for the legislation was to give protection in the United States so that foreign countries would also provide protection to American records released before 1978, which would provide a financial benefit to American copyright holders).

266. NIMMER COMMENTARY, *supra* note 261, at 6.

whether the government's rationale for copyright restoration justifies burdening the free speech of those who rely on public domain works.

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* J.D. Candidate 2009, DePaul University College of Law; Bachelor of Music 2006, University of Illinois at Urbana-Champaign. I am grateful to Professor Matthew Sag for his guidance, helpful comments on previous drafts, and good humor, and to Professor Roberta Kwall for her encouragement and valuable comments on an earlier version of this Note. I also appreciate the valuable comments of *DePaul Law Review* members Aaron White, Melissa Skinner, Nisha Verma, and Wes McCart. Finally, I would like to thank Tim, Jenny, Julie, and my dad and mom, whose love and support keep me going.